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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-468

LAWRENCE H. MILLIMAN, SR.,
Petitioner,

vs.

JOHN B. FRIEDRICH, THOMAS M. MURPHY, and JOY R. MILLIMAN, a/k/a JOYBELLE R. SMITH, a/k/a J. R. ACKERSON,
Respondents.

BRIEF FOR RESPONDENT FRIEDRICH IN OPPOSITION

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Respondent Minnesota District Court Judge John B. Friedrich appears in opposition to the Petition for Writ of Certiorari and respectfully prays that the petition be denied.

OPINION

The Order of the United States District Court, filed January 5, 1973, and the Judgment and Order of the Eighth Circuit Court of Appeals, filed April 17, 1973, from which appeal is taken, are reproduced in the appendix of Petitioner's petition. Neither was published.

JURISDICTION

The judgment of the Eighth Circuit was filed on April 7, 1973. An order denying a motion for rehearing was entered by the Eighth Circuit on June 5, 1973. The petition for certiorari in this matter was filed on September 11, 1973. Federal question jurisdiction under 28 U.S.C. §§ 1254, 1343 (1)-(4), 1443 (1)-(2), and 2201-2202, 42 U.S.C. §§ 1981-1994, and U.S. Const. amends. V and XIV has been asserted.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV provides in relevant part:

> Section 1. . . . No State shall . . . deprive any person of life, liberty or property, without due process . . . .

42 U.S.C. § 1983 (1971) (Vol. 9 U.S.C. (1971), p. 10, 283) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation on any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

QUESTIONS PRESENTED

1. Does the refusal by a state court judge to hear extended oral argument by a party to a quiet title proceeding in state court, which party's rights were previously adjudicated in another judicial proceeding, constitute a denial of a fair trial?

2. Does refusal by a judge to hear oral argument from a party in a patently insubstantial and frivolous § 1983 action, the judge having fully reviewed the file including a memorandum filed by said party, constitute a denial of a fair trial?

3. May an unsuccessful litigant in a state court divorce proceeding continue a course of harassment of the successful litigant in that proceeding by repeatedly commencing specious and insubstantial actions in federal court?

STATEMENT OF THE CASE

This is an action brought under 42 U.S.C. § 1983 (1971) in which petitioner Lawrence H. Milliman, Sr., appearing *pro se*, seeks money damages and injunctive relief against John B. Friedrich, a District Court Judge of the State of Minnesota, Joy R. Milliman, Petitioner's former wife, and Thomas M. Murphy, the attorney of Joy R. Milliman. Petitioner seeks relief against Respondent John B. Friedrich for his actions in issuing a certain order (set forth at pp. 10-14 of Petitioner's Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit—hereinafter referred to as "petition") in an action to determine adverse claims to real estate. In addition, Petitioner challenges the disposition of his case by United States District Court Judge Miles Lord.

To properly appreciate the issues of this litigation, a brief review of its history is necessary. On January 17, 1972 Petitioner and Joy R. Milliman were divorced, and a Judgment

and Decree was entered by the District Court for the Fourth Judicial District, State of Minnesota. *Milliman v. Milliman*, State of Minnesota, District Court, Fourth Jud. Dist., File No. D14611. As part of the final divorce decree, Joy R. Milliman was awarded all rights, claims, and title to certain real property free and clear of any right, claim, or title of her former husband.

Petitioner did not appeal this decision to the Minnesota Supreme Court—rather, following the entry of the judgment and decree in the divorce action, he attempted to "remove" the case to the U.S. District Court, District of Minnesota, Third Division, filing a petition for removal with the clerk of that court. The defendant-former wife in that case, *Milliman v. Milliman*, United States District Court, District of Minnesota, Third Division, File No. 4-72 Civ. 106, moved to dismiss for lack of subject matter jurisdiction and on June 1, 1972, a Memorandum Order was entered by the United States District Court, Judge Earl Larson, dismissing the case. Milliman appealed to the United States Court of Appeals for the Eighth Circuit and the decision of Judge Larson was summarily affirmed by that court on August 28, 1972. *Milliman v. Milliman*, United States Court of Appeals for the Eighth Circuit, File No. 72-1418 (unreported).

On May 4, 1972 the successors in interest to the real property of Joy R. Milliman (hereinafter referred to as "Sampsons") brought to trial an action in the District Court of Dakota County (First Jud. Dist.) to determine adverse claims to that realty. Both Joy R. Milliman and Petitioner Lawrence H. Milliman were named in the action as defendants. Midway through the first day of trial Petitioner filed an answer in which he asserted *no title or interest* in the realty but rather asked the court to find that his son-in-law and daughter, to

whom *he* had conveyed an interest, had good title to the property. (This conveyance occurred after the disposition of the realty in the divorce proceeding—*Milliman v. Milliman*, State of Minnesota, District Court, Fourth Jud. Dist., File No. D14611.)

The presiding judge, Respondent John B. Friedrich, honoring the divorce decree, ruled on October 17, 1972 that Petitioner had no right, claim, title, or interest in the real property. *Sampson v. Timberline, Inc., et al.*, State of Minnesota, District Court, First Jud. Dist. (Dakota County), File No. 72908, Judgment, paragraph 10, Petition at pp. 10-14. While Petitioner has accurately quoted paragraph 10 of the Judgment on p. 5 of his petition, he has, in an obvious attempt to mislead the Court, substantially and materially altered paragraph 11. Respondent Friedrich refers the Court to the true provisions of paragraph 11 on p. 14 of the petition.

Petitioner Milliman was displeased with Judge Friedrich's ruling. Again, instead of appealing that ruling to the appropriate state court he brought a civil rights action in the United States District Court against Judge Friedrich, petitioner's former wife Joy R. Milliman and Thomas M. Murphy, attorney for Joy R. Milliman. In that action, *Milliman v. Friedrich, Murphy and Milliman*, United States District Court, District of Minnesota, Third Division, File No. Civil Action 3-72-326, petitioner alleged that his civil rights had been infringed by Judge Friedrich's acceptance of the terms of the divorce decree relating to ownership of the realty.

United States District Court Judge Miles Lord granted the motions of all defendants to dismiss petitioner's complaint on January 4, 1973. On January 5, 1973, judgment was entered in the United States District Court for the District of Minnesota, Third Division. The judgment dismissed Petitioner's

complaint with prejudice, awarded defendants judgment for their costs and awarded Petitioner's former wife judgment for attorney fees in the amount of $250.00.

Petitioner served Notice of Appeal on Respondent Friedrich on January 31, 1973 and filed said Notice of Appeal with the United States Court of Appeals for the Eighth Circuit on February 5, 1973. Petitioner's appeal was docketed in that court on February 16, 1973. Upon motions of defendants Friedrich, Milliman and Murphy to summarily affirm and to dismiss the appeal under Local Rules 8 and 9 of the Eighth Circuit,[1] and after Petitioner's filing of his Appellant's Brief to the Eighth Circuit in which petitioner fully argued his case, that court entered its order, filed April 17, 1973, summarily affirming Judge Lord's order and dismissing the appeal. The Eighth Circuit held that Judge Friedrich was immune from this civil suit since he was acting in his official capacity and that the remaining defendants were not acting under color of law.

In a MOTION FOR REHEARING dated April 26, 1973, petitioner moved the Eighth Circuit to reconsider. On May 22, 1973, petitioner filed with the Clerk of the Eighth Circuit

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[1] Pertinent provisions of Local Rules 8 and 9 of the United States Court of Appeals for the Eighth Circuit are as follows:

RULE 8. SUMMARY DISMISSAL OR AFFIRMANCE.

Within fifteen days after the appeal has been docketed in this Court, the appellee may file a motion to dismiss or a motion to affirm. . . .

(a) A motion to dismiss any appeal shall relate to the issue that the appeal is not within the jurisdiction of the Court.

(b) A motion to affirm shall be based on the ground that the questions presented for review are so unsubstantial as not to need further argument. . . .

RULE 9. FRIVOLOUS AND UNMERITORIOUS APPEALS.

If upon consideration of any interlocutory motion, or as a result of a review under Rule 6, it shall appear to the Court that the appeal is frivolous and entirely without merit, the appeal may be dismissed without the notice contemplated in Rule 8.

a document entitled "APPELLANT'S REQUEST FOR CERTIFICATION AND TRANSMISSION OF RECORDS ON APPEAL TO THE CLERK OF UNITED STATES SUPREME COURT". On June 5, 1973, the Eighth Circuit entered its order denying Petitioner's request for rehearing.

On September 11, 1973, Petitioner filed and docketed with this Court a Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit.

REASONS FOR DENYING THE WRIT

The reasons for denying petitioner's request are numerous. One of the more important, however, is that a grant of certiorari would allow petitioner, who has at all times appeared *pro se*, to further the program of harassment which he has directed subsequent to his divorce at his former wife, and as incidental thereto, judicial officers. Petitioner, opted not to seek the speedy and economical route for resolving his disagreement with the divorce court's ruling with regard to the realty in question—specifically, an appeal to the Minnesota Supreme Court. Rather, he improperly attempted to "remove" the divorce action (after judgment) to federal court and, that having been rejected by the United States District Court and the Eighth Circuit, attempted to conjure up such irregularities in the *Sampson* adverse claims proceeding, over which Respondent Friedrich presided, as would lay the foundation for a civil rights action. That civil rights action, in which Judge Friedrich has been made defendant, has been dismissed by the United States District Court and the action of the District Court has been summarily affirmed, owing to the insubstantial and frivolous nature of the appeal, by the Eighth Circuit.

The explanation for Petitioner's erratic actions is obvious. Since the divorce he has been and is continuing to force his former wife to incur unnecessary legal expenses. Granting certiorari in this case would, to the delight of Petitioner, give new life to his scheme. From the relief sought by Petitioner in the complaint in this matter, to wit, both declaratory and monetary relief, it is apparent that Petitioner has selected the most expensive route of appeal from the disposition of the realty.

Apart from this basic equitable consideration, Petitioner's petition and his cause of action suffer from additional infirmities.

First, the petition was not timely. Supreme Court Rule 22.3. provides:

> A petition for writ of certiorari in all other cases shall be deemed in time when it is filed with the clerk within the time prescribed by law.

28 U.S.C.A. § 2101(c) (1959), the relevant law, provides:

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

While the order of the Eighth Circuit of which Petitioner seeks review was filed on April 17, 1973, Petitioner's petition was not filed with this Court until September 11, 1973, well in excess of the allowable 90 days. Even if the Eighth Circuit order were considered final only as of the date of the en-

try of its order denying petitioner's motion for rehearing, specifically, June 5, 1973, Petitioner still has failed to file his petition within the 90-day period, which ended September 3, 1973. Owing to the nature of Petitioner's action, as described above, there can be no good cause for extension.

Second, as asserted by counsel for Joy Milliman to Judge Miles Lord in the District Court, the complaint should be dismissed for lack of subject matter jurisdiction. Since Petitioner's complaint is insubstantial and frivolous it fails to state any substantial federal question. Federal question jurisdiction is therefore absent. In a case dealing with a similar fact situation, where an unsuccessful litigant in a state divorce proceeding brought a civil rights action in federal court, the United States District Court for the Northern District of New York dismissed the complaint for want of a substantial federal question. *Jemzura v. Belden,* 281 F. Supp. 200 (N.D.N.Y. 1968). In that case Judge Timbers stated:

> There is abroad in the land a notion that the Civil Rights Act has vested in the federal courts the function of an Ombudsman—to review any grievance, no matter how petty, stemming from the aggrieved party's unsuccessful results in state court litigation. Nothing could be further from the Congressional purpose.

281 F. Supp. at 206.

The infringements of Petitioner's constitutional rights to fair trial, which he articulates as the basis for his action, consist of Judge Friedrich's refusal to hear Petitioner belabor his arguments in the *Sampson* case and Judge Lord's refusal to hear his oral argument in the District Court. Judge Friedrich refused further argument from the Petitioner when it

became apparent that (1) the matter of his ownership of the realty was res judicata, per the earlier divorce proceeding, and (2) that Petitioner in fact asserted *no title or interest* in the realty in his answer, but, to the contrary, asserted that he had conveyed any interest which he had to certain third parties. Judge Lord, in the United States District Court action, dismissed Petitioner's complaint after having fully reviewed the file—including a RESPONSE OPPOSING DEFENDANT'S MOTION FOR DISMISSAL, dated January 3, 1973, which Petitioner had filed.

Clearly, Judge Friedrich's action was justified. Furthermore, since Petitioner had the opportunity to present his written arguments to Judge Lord and did in fact do so in his RESPONSE, there can be no substantial question as to whether Petitioner was denied rights of fair trial or any other constitutional right. Simply stated, there is no substantial federal question.

Third, and with particular regard to Respondent Friedrich, Judge Friedrich is immune from civil suit by virtue of the doctrine of judicial immunity. In the case of *Serbus v. Hoffman*, 450 F. 2d 296 (8th Cir., 1971), in which a *pro se* plaintiff brought an appeal in a similar case against a state judge, the Eighth Circuit Court summarily affirmed (under Local Rule 8) the District Court's dismissal of the complaint, noting:

> . . . the allegations of the complaint arose out of action taken by Judge Hoffman when he was serving in his official capacity as a state judge, and the doctrine of judicial immunity is applicable and protective. Pierson v. Ray, 386 U.S. 547, 554, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1966). See also Jones v. Jones, 410 F. 2d 365, 366 (7th Cir., 1969).

450 F. 2d at 298. See also *Gay v. Heller*, 252 F. 2d 313 (5th Cir., 1968) (§ 1983 case); *Haldane v. Chagnon*, 345 F. 2d 601 (9th Cir., 1965) (§ 1983 case). Clearly, the Milliman complaint stated no cause of action against Friedrich since he is immune from a civil suit of this nature, which has arisen out of reasonable action taken by him in the course of his judicial duties.

CONCLUSION

On p. 7 of his petition, Petitioner asserts that "it was apparent that there was more than a casual knowledge and relationship between the various trial judges, because of the similarity of the treatment afforded him in the state and federal courts". This Court, if it denies the Milliman Petition, will surely be added to Petitioner's list of jurists who have made it their life's goal to deprive him of his day in court. Notwithstanding, Respondent Friedrich respectfully requests that, for the reasons outlined above, the PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE EIGHTH CIRCUIT in this matter, should be denied.

Respectfully submitted,

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Dated: October 1, 1973.